

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

KEVIN BOETTNER #906170

§

v.

§ CIVIL ACTION NO. 6:05cv202

DOUGLAS DRETKE, ET AL.

§

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ADMINISTRATIVELY CLOSING CASE

The Plaintiff Kevin Boettner, proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

On September 12, 2005, the Magistrate Judge issued a Report recommending that the lawsuit be dismissed and that Boettner's *in forma pauperis* status be revoked, concluding that Boettner had filed at least three lawsuits or appeals which had been dismissed as frivolous or for failure to state a claim upon which relief could be granted. *See* 28 U.S.C. §1915(g). Boettner filed objections to this Report, asserting that two of those prior lawsuits had cert petitions pending in the Supreme Court of the United States, and thus could not be counted as strikes for purposes of Section 1915(g).

On September 30, 2005, the Magistrate Judge issued a second Report. This Report observed that Boettner currently had an appeal pending before the Fifth Circuit raising this precise question; he had had a prior lawsuit dismissed under Section 1915(g) despite his objections that two of his prior cases were not final and should not be counted as strikes. As a result, the Magistrate Judge recommended that the present lawsuit be administratively closed pending the outcome of this appeal. Boettner filed objections to the Magistrate Judge's Report on October 14, 2005.

The Court has conducted a careful *de novo* review of the pleadings in this cause, including the original complaint, the Report of the Magistrate Judge dated September 30, 2005, the Plaintiff's objections thereto, and all pleadings, documents, and records in the case. Upon such *de novo* review, the Court has concluded that the Report of the Magistrate Judge of September 30, 2005 is correct and that the Plaintiff's objections are without merit. It is accordingly

ORDERED that the Plaintiff's objections are overruled and the Report of the Magistrate Judge dated September 30, 2005, is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled civil action be and hereby is ADMINISTRATIVELY CLOSED and placed on an inactive docket for administrative and statistical purposes until such time as the Fifth Circuit renders its decision in Boettner v. Dretke, et al., Fifth Circuit docket no. 05-41208. This action shall not affect the substantive rights of any party to this case. Finally, it is

ORDERED that the Clerk shall accept no pleadings in this cause, until it is replaced on the active docket, except for notification to this Court of action taken by the Fifth Circuit in the prior case of Boettner v. Dretke, now on appeal, or a timely notice of appeal of this order of administrative closing.

SIGNED this 24th day of October, 2005.



MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE